Pacemaker Driver Service, Inc., Carrier Corporation Carrier Trucking Service *and* Robert C. Barnes, Teamsters Local Union No. 519. Case 10–CA–16850

13 April 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 12 October 1982 Administrative Law Judge William N. Cates issued the attached decision. The Respondents filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified herein.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Pacemaker Driver Service, Inc. and Carrier Corporation Carrier Trucking Service, Knoxville, Tennessee, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 1(c) and (d).

"(c) Threatening employees with closure of the Knoxville, Tennessee facility if they join or engage in activities on behalf of Teamsters Local Union No. 519 or any other labor organization.

"(d) Discharging and thereafter failing and refusing to reinstate employees because they join or engage in activities on behalf of Teamsters Local Union No. 519 or any other labor organization."

2. Substitute the following for paragraph 2(a).

"(a) Reestablish the Knoxville, Tennessee domicile and offer immediate and full reinstatement to its employees Jonah C. Gates, Donnie Bales, David Donaldson, and Hickman S. Ridley, Jr., to their former jobs or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered by reason of their unlawful discharges, with interest, as set forth in the section of this decision entitled 'The Remedy.'"

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This matter was tried before me at Knoxville, Tennessee, on April 21 and 22, 1982. The hearing was conducted pursuant to a complaint and notice of hearing issued by the Acting Regional Director for Region 10 of the National Labor Relations Board, hereinafter the Board, on June 4, 1981, and was based on a charge which was filed by Robert C. Barnes, Teamsters Local Union No. 519, hereinafter the Union, on April 2, 1981. The complaint alleges that Pacemaker Driver Service, Inc., hereinafter Pacemaker, and Carrier Corporation Carrier Trucking Service, hereinafter Carrier (Pacemaker and Carrier hereinafter shall be jointly referred to as the Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act, hereinafter the Act.

The complaint was amended on April 21, 1982, at the hearing. The answers of the parties as amended at the hearing placed in issue the following.

1. Whether Pacemaker and Carrier constituted a joint employer of the drivers herein.

2. If the issue in issue 1 above is resolved finding that Pacemaker and Carrier constituted a joint employer, was dispatcher David Hagaman, at material times herein, an agent acting on behalf of the Respondent and was he a supervisor within the meaning of Section 2(11) of the Act.

3. If the issue in issue 1 above is resolved finding that Pacemaker and Carrier constituted a joint employer, did the Respondent violate Section 8(a)(1) of the Act by the following alleged conduct.

(a) Whether Carrier Manager C. S. Henninger Jr. about January 29, 1981, interrogated the Respondent's employees concerning their union membership, activities, and desires, and the union membership, activities, and desires of other employees.

---

[1] Both Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Respondent Carrier also filed a "Motion for Leave to File Supplemental Citation of Authority" concerning the Seventh Circuit's opinion in *Sioux Products v. NLRB*, 684 F.2d 1251 (1982). The motion is hereby denied because the Board takes judicial notice of all relevant Board and court decisions.

[2] In adopting the judge's conclusion that Respondents Carrier and Pacemaker constitute a "joint employer" for purposes of the Act, we rely on his application of the standard for determining "joint employer" status set forth in *C. R. Adams Trucking*, 262 NLRB 563 (1982), and *Manpower Inc., of Shelby County*, 164 NLRB 287 (1967), i.e., whether two or more employers share or co-determine those matters governing the essential terms and conditions of employment. See *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982). We also find it unnecessary to pass on the judge's reliance on the January 1980 settlement agreement executed by both Respondents in settlement of an unfair labor practice charge filed by one of the alleged discriminatees herein.

[3] We shall modify pars. 1(c) and (d) and 2(a) of the judge's recommended Order to more appropriately remedy the violations found and to conform to the judge's notice.

(b) Whether Carrier Manager Henninger about March 13, 1981, threatened the Respondent's employees with discharge if they joined or engaged in activities on behalf of the Union.

(c) If the issue in issue 2 above is resolved finding dispatcher Hagaman to be a supervisor within the meaning of Section 2(11) of the Act did the Respondent violate Section 8(a)(1) of the Act by the following conduct:

(1) Whether dispatcher Hagaman, about February 5, 1981, threatened the Respondent's employees with the closure of the Knoxville, Tennessee terminal if they joined or engaged in activities on behalf of the Union.

(2) Whether dispatcher Hagaman on or about February 26, 1981, in a telephone conversation threatened the Respondent's employees that it would discharge all its employees and close its Knoxville, Tennessee terminal if the employees joined or engaged in activities on behalf of the Union.

(d) Whether Pacemaker Manager of Industrial Relations Joseph R. Weissenberger, about February 22, 1981, solicited grievances from the Respondent's employees and promised to adjust said grievances with knowledge that the employees had engaged in union activity.

4. Whether the Respondent violated Section 8(a)(1) and (3) of the Act, when about March 30, 1981, it discharged and thereafter, failed and refused to reinstate its employees Jonah C. Gates, Donnie Bales, David Donaldson, and Hickman S. Ridley Jr. because of their membership in and activities on behalf of the Union and because they engaged in activities with other employees for the purposes of collective bargaining and other mutual aid and protection.

On the entire record, including my observation of the demeanor of the witnesses, and after full consideration of the briefs filed by counsel for the General Counsel, counsel for Pacemaker, and counsel for Carrier, I make the following

FINDINGS OF FACT

I. JURISDICTION

Pacemaker is an Indiana corporation with an office and place of business located at Knoxville, Tennessee, where it is engaged in the service of providing driver personnel to private, common, and contract carriers as an essential link in the interstate transportation of commodities. During the 12 months immediately preceding issuance of the complaint, which is a period representative of all times material herein, Pacemaker in the course and conduct of providing the services outlined above received gross revenues in excess of $50,000.

Carrier is a Delaware corporation with an office and place of business located in Knoxville, Tennessee, where it is engaged in the manufacture and sale of air-conditioners. During the 12 months immediately preceding issuance of the complaint, which is a period representative of all times material herein, Carrier sold and shipped from its Knoxville, Tennessee facility, finished products valued in excess of $50,000 directly to customers located outside the State of Tennessee.

Pacemaker and Carrier admit and I find they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges it is admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Carrier is primarily engaged in the manufacture of air-conditioning equipment; however, it either wholly owns or has as subsidiaries various other corporation such as Allied Products, Athens Products, and the Inmont Corporation. Carrier itself is wholly owned by United Technologies Corporation. That portion of Carrier directly involved in the instant case is the portion that handles its in-house truck transportation services. The in-house trucking service handles approximately 10 percent of the freight needs of Carrier and its affiliated companies. Carrier leases the trucks it operates as well as the drivers it utilizes. Carrier domiciles its drivers at various locations throughout the United States including Knoxville, Tennessee, the location in question in the instant case. Carrier's transportation operation is also based in Knoxville, Tennessee.

Pacemaker operates a professional driving service that leases tractor-trailer operators to various corporations, including Carrier. The drivers leased to Carrier are utilized at certain of Carrier's domiciliary locations. Pacemaker and Carrier operate pursuant to a written agreement. Pacemaker began providing drivers to Carrier in 1977. Prior to 1977 Carrier utilized its own drivers to fulfill its transportation needs. In 1977 when Pacemaker assumed the responsibility of providing Carrier with the drivers it needed it required the Carrier drivers to file applications for employment with it. Three of the four drivers at the Knoxville, Tennessee location continued to drive for Pacemaker, without a break in service, after Pacemaker assumed the responsibility of providing drivers for Carrier at certain of its domiciliary locations. The drivers of Carrier that were employed by Pacemaker retained their Carrier seniority when they commenced to operate as Pacemaker drivers. The drivers at the Knoxville, Tennessee domicile continued to have the same dispatchers as they had when they were Carrier drivers.

In 1979 there was a Board-conducted election involving Pacemaker and the Union at Pacemaker's Knoxville, as well as its Nashville and Memphis, Tennessee facilities. The election was held on December 7, 1979, with a majority voting against the Union. A Certification of Result of Election in Case 10–RC–11934 issued on December 20, 1979.

B. *The Joint Employer Issue*

The Board reaffirmed in *Holiday Inn of Benton*, 237 NLRB 1042, 1044 (1978), that it considers four principal factors in determining whether two arguably separate employers will be treated as a joint employer. These fac-

tors are: (1) interrelationship of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control. The Board noted further in *Holiday Inn of Benton*, that no individual factor is controlling in making a determination as to joint employer status; however, emphasis is placed on the first three factors set forth above particularly the critical factor of centralized control of labor relations. See also *Daka*, 257 NLRB 325 (1981).

In applying the pertinent principles outlined above to the facts of the instant case it is important to note the agreement between Pacemaker and Carrier. The agreement dated April 7, 1980, called for Pacemaker to furnish driver personnel to Carrier. The agreement stated that no driver, agent or employee of Pacemaker would be considered an agent, driver, or employee of Carrier, and that Pacemaker would direct and control its employees to include the selection, hiring, firing, training, setting of and paying wages, benefits, workmen compensation, FICA, unemployment taxes, and adjusting any complaints of its employees.[1] The agreement further stated that the drivers would be subject to discharge and discipline by Pacemaker only—with exceptions as outlined in the agreement. The agreement stated Carrier would assume control of the drivers through dispatching or necessary compliance with Interstate Commerce Commission requirements only to effectuate the results to be accomplished.

The agreement states that drivers supplied by Pacemaker must meet all qualifications of the Interstate Commerce Commission, the United States Department of Transportation, and other requirements imposed by law, and that the drivers must comply with the safety regulations and rules of the Interstate Commerce Commission and/or United States Department of Transportation. The agreement provides that all drivers are to participate in a safety program based on the American Trucking Association, Incs.' safety program. The agreement states, "Carrier shall have the right to examine and pass upon the qualifications of each Driver, supplied by the Contractor [Pacemaker], and the right to initially reject any Driver who, in its judgment, fails to meet any of such qualifications or requirements."

Pacemaker maintains records and reports pertaining to the drivers and makes them available to Carrier for examination and inspection upon a reasonable notice from Carrier. The agreement provides in part:

> Carrier shall obtain and maintain all reports, records and other data necessary to comply with applicable safety regulations of the Federal Highway Commission, Department of Transportation, Interstate Commerce Commission, Federal and State Governmental regulatory agencies in connection with the operation of vehicles; and will make copies of such reports, records or other data available to Contractor [Pacemaker], upon its request.
>
> Carrier shall assume full responsibility to check periodically Driver's log and other reports, records and other data pertaining solely to and required by the Interstate Commerce Commission or other governmental regulatory agencies in the operation of the vehicles and Driver's use thereof.

The agreement requires Carrier to maintain insurance on each of the vehicles driven by Pacemaker drivers. The agreement further states: "Where necessary and upon request by Carrier, Contractor [Pacemaker] will advance money to its Drivers for ordinary and necessary expenses (including tolls, lodging and other miscellaneous road expenses) in furtherance of Carrier's trade and business."

The agreement between Pacemaker and Carrier further provides, in part, that upon receipt of a written complaint from Carrier specifying a driver's reckless or abusive handling of a vehicle or violation of any governmental rule, regulation, statute or ordinance, use of a vehicle for any illegal purposes or for purposes not within the scope of Carrier's business or other misconduct, Pacemaker would immediately take proper corrective action to see that such conduct was forthwith eliminated.

The agreement at article XI titled, "Discharge of Drivers," provides as follows:

> Upon Contractor's [Pacemaker] receipt of a written complaint from Carrier specifying ground for disqualification of any Driver under the U. S. Department of Transportation's Motor Carrier Safety Regulations, as amended from time to time, or reckless, careless or abusive handling of any vehicle, or other incompetence bv or of any Driver or conduct which in Carrier's sole judgment deems inimical to its best interest, Contractor [Pacemaker] shall remove such individual as a Driver of such vehicle as soon as possible.

The events, at the time of the change by Carrier from utilizing its own drivers to utilizing Pacemaker's drivers, reflect that three of the four Carrier drivers domiciled at Knoxville, Tennessee, were acquired by Pacemaker and were given their full Carrier seniority. The drivers continued to be directed on a daily basis, with respect to their job assignments, by Carrier dispatchers.[2] Carrier dispatchers assigned Pacemaker drivers routes to be followed and rerouted them. The drivers telephoned Carrier dispatchers on a daily basis and usually several times during a day. In addition to being required to call in daily the drivers were required to call the Carrier dispatchers when they had unloaded on outbound freight and whenever they were loaded on inbound freight. Driver Gates credibly testified that he only called Pacemaker approximately every 3 months but that he daily

[1] More specifically the agreement requires Pacemaker to provide an employee pension benefit plan; to collect and pay all Federal Insurance Contribution Act (FICA) and federal unemployment taxes; to deduct and withhold federal and state income taxes; to comply with all applicable state workmen compensation laws; to pay all taxes due Federal, state or municipal agencies; to comply with the Fair Labor Standards Act of 1938, as amended; and, to comply with applicable state unemployment taxes.

[2] As is set forth in detail elsewhere in this decision, the evidence warrants and I have determined that Carrier Dispatcher Hagaman was a supervisor within the meaning of Sec. 2(11) of the Act.

contacted Carrier dispatchers regarding work assignments.

Pacemaker, in a written communication (Pacemaker Exh. 3) to each of its drivers dated March 18, 1981, discused its relationship with Carrier. The correspondence stated in part at various paragraphs:

> Hazardous materials, loading and unloading, routes to be used, destinations of loads, schedule of time at work, and running legal, all fall into the category of working conditions.
>
> These and the other items mentioned are management decisions made by the supervisory personnel at Carrier Trucking Service in order that they get their freight delivered.
>
> Some of the decisions which the Carrier Trucking Service personnel have to make occasionally are very unpopular with the drivers—they are not necessarily popular with the dispatchers—however, they are management decisions which are made in the best interest of the Carrier Private Fleet operation and must be adhered to. Beyond the fact that your jobs directly depend on this, the fleet's existence as a whole also depends on it.

Pacemaker Manager of Industrial Relations Weissenberger forwarded to Carrier Manager C. S. Henninger on July 25, 1980, a copy of a wage and fringe benefit comparison between the Carrier account and three other clients of Pacemaker along with a current union scale for drivers. In his cover letter accompanying the wage and fringe benefit comparison, Weissenberger stated, I hope this information is useful to you in your analysis of a new increase for the drivers. Weissenberger advised Henninger in his letter that he would be in Knoxville, Tennessee, to discuss with him the coming wage and fringe benefit package.

Other indications of the relationship between Pacemaker and Carrier are contained in the disposition of a 1979 charge filed against Pacemaker by driver Jonah C. Gates in Case 10–CA–15157. That portion of the charge which was not dismissed by the Board was settled by a written settlement agreement. The agreement, which was approved by the Regional Director for Region 10 on January 18, 1980, was jointly signed by Pacemaker and Carrier and Pacemaker and Carrier agreed to jointly post a jointly signed "Notice to Employees."

Pacemaker contends unequivocally that it is the employer of the drivers in the instant case, and that there is no substantial evidence to support any conclusion that Carrier is also an employer of the drivers. Pacemaker contends that Carrier is only one of its many clients involving only one terminal and that the record is void of any evidence of any interrelationship between Carrier and Pacemaker other than the assignment of drivers to Carrier's fleet. Pacemaker acknowledges that Carrier has certain day-to-day control over Pacemaker drivers with respect to dispatching, collecting of logs, daily telephone contacts, location of equipment, and scheduling of return loads. However, Pacemaker contends that this day-to-day activity represents the minimum participation needed by Carrier to achieve their intended result, i.e., the delivery of freight. Pacemaker further contends that any shipper in a similar situation would have to monitor the flow of its freight in the same manner and as such does not constitute an employer relationship between the drivers and Carrier. Pacemaker contends that on those occasions when Carrier informed it of any failure on the part of Pacemaker drivers to accomplish the delivery or pickup of freight such was necessary to avoid disruption of Carrier's achievement of having freight arrive on time without damage and as such does not demonstrate centralized control of labor relations. Pacemaker contends that other than the monitoring of the work product and an occasional communication with it when this work product was unsatisfactory, Carrier did not exercise any control over labor relations. Pacemaker also contends that there is no evidence in the record to indicate common ownership or financial control of either Carrier or Pacemaker over the other. Pacemaker contends all the record demonstrates is that there was a contractual relationship between Carrier and Pacemaker which necessarily required interaction between the parties but not beyond the extent necessary to accomplish the performance of their basic contractual duties, and accordingly, Pacemaker and Carrier were not joint employers.

Carrier advances many of the same contentions that Pacemaker does. Additionally, Carrier contends there is no record evidence to indicate that it had ever exercised that portion of the agreement between itself and Pacemaker whereby it could in its sole judgment have a driver removed where it deemed it would be in its best interest. Carrier contends that it is not involved in decisions concerning discipline of drivers. Carrier also contends that Pacemaker is responsible for holding drivers' meetings at which time wage and benefit packages are discussed and the drivers have a chance to air their complaints. Carrier contends the drivers were Pacemaker's employees, initially employed by Pacemaker, and that Pacemaker was responsible for all incidents of employment related to the drivers. Finally, Carrier contends that the agreement with Pacemaker did not create a joint employer relationship and that the only testimony on this point was that the parties did not deviate from the terms of the agreement.

Counsel for the General Counsel contends that a joint employer status has been demonstrated in that the Carrier drivers retained their jobs as well as their seniority when they were placed under the Carrie-Pacemaker contract and were provided with written work rules covering operations, pay, and benefits under the title "Carrier Trucking Service," and that their supervision did not change. Counsel for the General Counsel contends that Carrier dispatchers substantially controlled the day-to-day activity of the Pacemaker drivers and that the drivers only immediate supervision was provided by Carrier. The General Counsel contends that further indications of a joint employer status are demonstrated by the fact that Carrier and Pacemaker jointly agreed on driver wage rates and benefits and that they jointly settled a National Labor Relations Board charge by jointly posting a notice. Finally, the General Counsel contends that Carri-

er possesses a high degree of control over the discipline and discharge of the drivers employed by Pacemaker.

In agreement with counsel for the General Counsel, I find that all the factors weighed in their totality warrant a finding that Pacemaker and Carrier function as a joint employer with respect to the drivers supplied by Pacemaker and utilized by Carrier. I am persuaded that the facts demonstrate that Carrier exercises sufficient control over the drivers whom it leases from Pacemaker to constitute an employer of those employees. See *CPG Products Corp.*, 249 NLRB 1164 (1980).

I am persuaded that Carrier and Pacemaker share or co-determine those matters governing the essential terms and conditions of employment of the drivers that Pacemaker provides to Carrier. The record evidence clearly establishes that Carrier maintained the right to unilaterally reject any driver who, in its judgment, did not meet the necessary qualifications or requirements that it had outlined. Carrier maintained the right to examine all records and other data kept by Pacemaker that related to or had any bearing on the drivers operations that would be of benefit to Carrier. Carrier maintained all safety records and retained the right to periodically check all driver logs and other reports for or pertaining to Interstate Commerce Commission requirements. Carrier also reserved the right to cause the discharge of any Pacemaker driver that it (Carrier) in its "sole judgment deems inimical to its best interest." Pacemaker advanced money to its drivers for ordinary expenses in furtherance of Carrier's business. Likewise, the day-to-day control of the drivers was through Carrier with the drivers only checking with Pacemaker on an infrequent and sporadic basis. The daily routes to be followed by the drivers as well as their alternate routes were directed and controlled by Carrier. Further, with respect to controlling jointly the essential terms and conditions of employment, the record clearly indicates that working conditions were considered management decisions made by the supervisory personnel of Carrier and it was in the best interest of Pacemaker drivers to adhere to those management decisions made by Carrier. In fact Pacemaker notified its drivers in writing that their jobs depended on their adherence to those management decisions of Carrier. Further, the record establishes that prior to any wage or benefit increases being given to the Pacemaker drivers wage comparison charts were provided to Carrier by Pacemaker and those charts were discussed by them before any benefit package was presented to the drivers. I am therefore persuaded that the essential terms and conditions of employment for the drivers were jointly determined by Carrier and Pacemaker. The Board has held where two employers share or co-determine matters governing the essential terms and conditions of employment, they are to be considered joint employers for purposes of the Act. See *C. R. Adams Trucking*, 262 NLRB 563, 564 (1982). See also *Manpower Inc., of Shelby County*, 164 NLRB 287, 288 (1967).

It is clear from the record herein that there is no common ownership or common financial control between Carrier and Pacemaker. However, these facts are insufficient to offset the cumulative effect of the evidence regarding the other factors here in consideration which indicate a joint employer status. On the above premises I find that Pacemaker and Carrier constitute a joint employer for purposes of the Act.

C. *Supervisory Status of Hagaman*

The General Counsel alleges and Pacemaker and Carrier deny that at all times material herein Carrier dispatcher David Hagaman was an agent of the Respondent, acting on its behalf, and that he was a supervisor within the meaning of Section 2(11) of the Act.

Driver Jonah Gates testified, and I credit his testimony in this respect, that Carrier dispatcher Hagaman (or Carrier dispatcher David Johnson) dispatched all of the Pacemaker drivers, determined their routes, and rerouted them while they were making a delivery if necessary. The drivers were required to telephonically report to dispatcher Hagaman on a daily basis at 9 a.m., according to Gates, and notify Hagaman when they had unloaded their outbound freight or when they had loaded freight for the return back haul. Gates testified he contacted Hagaman on some occasions several times per day. Hagaman was to be kept fully informed of the times that the drivers were out of service for any purpose while on the road.

The record reflects that it was dispatcher Hagaman who notified the drivers that they were laid off when Carrier decided to discontinue utilizing a Knoxville, Tennessee domicile point for certain of its trucks.

Driver Hickman S. Ridley Jr. testified that he was told by dispatcher Hagaman as well as dispatcher Johnson to make a particular delivery run in a manner that Ridley stated he could not complete legally. As a result of the instructions from Hagaman and Johnson, Ridley falsified his log books in order to make the run as instructed because he was told if he did not make the run as directed they (Hagaman and Johnson) would get someone else who would get the run where it needed to be.

The record reflects that driver Gates was notified in writing on March 11, 1981, by Pacemaker Manager of Industrial Relations Weissenberger that he (Gates) had followed the dispatcher's (Hagaman) instructions to the letter in an incident on February 23, 1981. The letter aprises Gates that common sense dictated that the dispatcher (Hagaman) meant for Gates to call in when he was ready to leave a particular stop rather than call in to Hagaman every 30 minutes as Gates did. The letter to Gates from Weissenberger continued: "Don't let the attitude of a few rub off on you. Let the dispatchers know when you are going to be delayed."

Further written communication between Weissenberger and Gates is enlightening with respect to whether the Carrier dispatchers—Hagaman in particular—were supervisors within the meaning of the Act. In a letter dated March 18, 1981, addressed to Gates from Weissenberger (G.C. Exh. 3). Weissenberger points out to Gates that such matters as loading and unloading of trucks, routes to be used, destination of loads, scheduling of time at home, running legal, and the hauling of hazardous materials all fell into the category of working conditions. Weissenberger continued in his letter to Gates that such items were management decisions made by the superviso-

ry personnel at Carrier, and that the drivers' jobs depended on their adherence to those management decisions of Carrier. Weissenberger informed Gates that the complaints of the Pacemaker drivers about the dispatchers had been discussed with Carrier Manager C. S. Henninger Jr. and dispatchers Hagaman and Johnson. Weissenberger then, in the very next sentence of his letter to Gates, stated that the Carrier supervisory personnel felt that the driver/dispatcher concerns were a double-edged sword and that both the drivers and dispatchers needed to cooperate with each other.

Carrier presented as a witness its Director of Logistics Sanford Abrahams, who testified that the term dispatcher when used by Carrier was not used in the traditional sense of the word. Abrahams stated that the dispatchers of Carrier operated in "almost a predigested environment." Abrahams also testified that he established the dispatcher program at Carrier so that as the transportation portion grew; ". . . we designed this system of dispatching that pretty much tells a fellow the rules of the game, how to do it, it gives him quite a series of guidelines about priorities. . . ." Abrahams testified that the program was set up so that whatever number of dispatchers Carrier might employ, they would all perform their jobs in essentially the same manner.

Abrahams further testified:

> We have a responsibility of the dispatchers to write on a clipboard that says when someone calls you on the phone, be it a customer, or be it a driver, you have a little board that you write down the information on, and what you're committed to as far as customer service or, in fact, what you have told the driver, and what he was supposed to do.
>
> We have rules that say—you mentioned before, we only handle 10 percent of the total available; well, very often we have more calls than we have trucks, so, we have determined for them a priority, how do you handle more calls than you have trucks; we have a listing of priorities that have been assigned people top priority, and some people lower priority, or some customers, we handle all their business, some customers we might handle 10 percent.
>
> He's [the dispatchers] really not supposed to change the priority listing, now, not to say that, you know, any given day—it's not the Bible, frankly; but, he should adhere to that list, and if he really has a problem he should go to his superior, and not exercise his own judgment.

Considering all of the foregoing, I am persuaded and conclude that Hagaman possessed supervisory authority requiring the independent exercise of judgment relating to the responsibility of directing the work of the drivers on a day-to-day basis. Unless Hagaman and Johnson were supervisors of the drivers within the meaning of the Act, the drivers would be virtually without supervision. The record facts establish that the dispatchers selected the routes for the drivers to follow, rerouted them when necessary, and even informed at least one driver if he could not make a particular run in the manner the dispatchers directed that the run be made, the dispatchers would get someone who would so do. No other individual on a management level had day-to-day contact with the drivers except the dispatchers. The written communications of Weissenberger to the drivers clearly indicated that Pacemaker considered Carrier dispatchers to be supervisors and instructed its drivers that their continued employment depended on their adherence to the dictates of the Carrier dispatchers. It is likewise apparent from Weissenberger's letter of reprimand to driver Gates regarding a Gates and Hagaman incident in Syracuse, New York, that Hagaman was a supervisor within the meaning of the Act. The letter of reprimand to Gates acknowledged that he followed the dispatcher's instructions to the letter, which to me indicates that Pacemaker expected its drivers to obey the instructions of the Carrier dispatchers.

I do not find Abrahams' testimony that the dispatchers operated in an "almost predigested environment" to detract from my conclusion based on a consideration of all the facts that the dispatchers were and are supervisors within the meaning of Section 2(11) of the Act. I therefore conclude and find that dispatcher Hagaman was a supervisor within the meaning of the Act. Cf. *Connecticut Distributors*, 255 NLRB 1255, 1257 (1981).

Even if I did not find Hagaman to be a supervisor within the meaning of the Act, I would find that in his position as virtually the only person to communicate to the drivers Carrier's policies and instructions, he had been placed by Carrier in a position of apparent authority where the drivers would reasonably believe that Hagaman's instructions reflected Carrier's company policy and that he spoke for management in his dealings with Pacemaker drivers and, as such, was an apparent supervisor and agent of Carrier such as to make his conduct attributable to Carrier. Cf. *Union Oil Co. of California*, 258 NLRB 1373 fn. 2 (1981), and *Jules V. Lane, DDS, PC*, 262 NLRB 118 (1982).

D. *The 8(a)(1) Allegations Attributed to Hagaman*

Paragraph 12 of the complaint alleges that about February 5, 1981, the Respondent, by its agent and supervisor dispatcher David Hagaman, in and about the vicinity of its Knoxville, Tennessee terminal, threatened its employees with closure of the terminal if they joined or engaged in activity on behalf of the Union. Paragraph 13 of the complaint alleges that the Respondent by dispatcher Hagaman about February 26, 1981, in a telephone conversation, threatened employees that it would discharge all its employees and close the Knoxville, Tennessee terminal if its employees joined or engaged in activities on behalf of the Union.

Driver Gates testified he had a telephone conversation with dispatcher Hagaman around February 5, 1981. Gates testified he had a breakdown in Syracuse, New York, which resulted in his taking the tractor-trailer he was driving to Lease-Way to be repaired. Gates testified he called dispatcher Hagaman and told him the truck was in the shop being repaired. Gates testified the repairs for the truck took some time so he again called dispatcher Hagaman. Hagaman told Gates he thought the truck was being taken in for fuel only and not to have any

safety work done on it at that time, because to have work done at that time would cause delivery of the freight to be late the next morning. Gates testified that dispatcher Hagaman started cursing and that he (Gates) hung up the telephone at that time. Gates thereafter called dispatcher Hagaman back approximately every 30 minutes until the truck was repaired. Gates testified that up until approximately 5 p.m. Hagaman or dispatcher Johnson called the Lease-Way personnel trying to get them to get the truck repaired and get it out of their shop. Gates left Syracuse after the repairs were made and proceeded on his trip to Pennsylvania and along the way stopped and called dispatcher Hagaman at Hagaman's home. Gates testified, "I told Mr. Hagaman that I didn't think I could carry on any longer with his dispatch and him a cussing and a carrying on, raising hell at the driver, because we didn't have time enough to have the trucks fixed to drive them safely, and that we were just going to have to go Union, that we had no guarantee over nothing, and that we would go Union on them." Gates stated, "Mr. Hagaman said that if we did, they would shut Carrier Trucking Service down at Knoxville; the drivers would lose their jobs, he would lose his job; and he said—his last comment was, I'll have to hang up because Mr. Henninger will end up getting the phone bill off of this and will want to know what it's all about; so, he hung up."

Dispatcher Hagaman was not called as a witness in this proceeding. Driver Gates was, at times in his testimony, evasive and unresponsive to questions, while at other times he would concede to the truth only when confronted with overwhelming proof such as the incident where he denied having received a copy of a dismissal letter from the Regional Director for Region 10 of the Board until confronted with a return receipt signed by him for the letter. Nevertheless, I am persuaded that although Gates was not a beacon of truth in a world of falsehoods, portions of his testimony were truthful. Accordingly, I credit that portion of Gates' testimony regarding his February 5, 1981 conversation with dispatcher Hagaman as outlined above. I do so, for among other reasons, it was uncontradicted and undenied and statements of a similar nature were made by dispatcher Hagaman to driver Ridley.

The remarks made by dispatcher Hagaman to driver Gates constitute a threat to employees of a closure of the Knoxville, Tennessee terminal if the employees joined or engaged in activities on behalf of the Union, in violation of Section 8(a)(1) of the Act. Inasmuch as I have found Carrier and Pacemaker to be a joint employer of the drivers and have found dispatcher Hagaman to be a supervisor within the meaning of the Act, the Respondent[3] is responsible for the acts of its supervisor and agent Hagaman.

Driver Hickman S. Ridley testified that around February 26, 1981, he called dispatcher Hagaman from either Warsaw or Kendallville, Indiana, to inform Hagaman that the freight from that particular location had been loaded. Hagaman wanted to know what time the load would get to Syracuse, New York. Ridley informed him (Hagaman) that he did not know because they were doing what they were told to do. Ridley testified Hagaman stated, "aw, come on, stop this stuff." Ridley told Hagaman he was just doing what he was told to do and stated that if they did not stop the harassment, it was going to end up in a union vote again. Ridley testified, "Mr. Hagaman told me, if you go to a Union vote, he said, they will close this place down, they'll fire you, and fire me, and they'll move the trucks out." Ridley told Hagaman that the drivers did not have much choice unless everyone stayed off their backs. According to Ridley that was the extent of the conversation. As just previously noted, dispatcher Hagaman did not testify.

Based on my observation of Ridley as he testified I am persuaded he did so truthfully and, as such, I credit his testimony with respect to his conversation with dispatcher Hagaman. I am not persuaded in the least that Ridley should be discredited because he indicated in his testimony that he would falsify log book entries. Ridley explained that the false entries were made in order to comply with requests of dispatchers Hagaman and Johnson in order to have deliveries made within a certain time frame.

I therefore conclude and find that the Respondent, through its agent and supervisor Hagaman in his conversation with Ridley, threatened its employees with discharge and closure of the Knoxville terminal if the employees joined or engaged in activities on behalf of the Union.

E. *The 8(a)(1) Allegations Attributed to Henninger*

Paragraph 11 of the complaint alleges that the Respondent, by its supervisor and agent Manager C. S. Henninger Jr. about January 29, 1981, in the vicinity of its Knoxville terminal, interrogated its employees concerning their union membership, activities, and desires and the union membership, activities, and desires of other employees. Paragraph 14 of the complaint alleges that Henninger about March 13, 1981, in the vicinity of the Knoxville, Tennessee terminal, threatened its employees with discharge if they joined or engaged in activities on behalf of the Union.

Driver Gates testified that in February 1981 he had unloaded his truck at Phoenix, Arizona, loaded it back, and called dispatcher Hagaman to tell Hagaman that he was ready to come back East with the return load. Hagaman informed Gates that Manager Henninger wished to speak with him. Gates testified that Henninger came on the telephone and wanted to know what was wrong with Carrier driver Calvin Cooper who was domiciled at Nashville, Tennessee. Henninger stated to Gates that Cooper had some kind of problem or was mad about something, and Henninger wanted to know if Gates knew anything about it. Gates told Henninger that he did not know exactly what was wrong with Cooper, but Cooper had been upset about having to unload a trailer that had seals on it when he believed he should not have been required to unload it. Gates testified that Henninger then wanted to know if there was any union activity, that he had heard from a driver through the grapevine that Cooper had been talking about a union. Gates told

[3] Carrier and Pacemaker jointly.

Henninger that he did not know anything about it. Henninger told Gates that he would "pull Calvin Cooper into Knoxville and have a little fireside chat with him." Gates placed the time of the telephone call at approximately 4 p.m., Phoenix time.

Manager Henninger testified that he did not have a telephone conversation with Gates on January 29, 1981, because he was not in his office on that date, but rather was in Nashville, Tennessee. Henninger's office is located in Knoxville, Tennessee. A disposition of this allegation requires resolving the credibility conflict between Gates and Henninger.

While portions of driver Gates' testimony was unresponsive and less than candid, I am persuaded in this particular instance Gates was telling the truth. Gates' testimony with respect to the January 29, 1981 conversation with Henninger is of a like nature to a conversation that Gates testified Henninger had with him in August 1979. I shall briefly set forth the 1979 conversation although of course no finding of a violation of the Act is made with respect to that conversation. Gates testified that Henninger told him in 1979 that Carrier was trying to get new equipment that would be in service after the first of the year (1980) and that Carrier was going to realign the safety department at Lease-Way to where the trucks would be safe on the road and in the same conversation Henninger inquired of Gates what it would take to keep the Union out at Carrier. Henninger did not deny the 1979 conversation about the Union that he was alleged to have made to Gates. I am persuaded that Gates told the truth with respect to the 1979 as well as the 1981 conversations. The fact that the dispatch log of driver Gates did not correspond to the time that Gates testified he called Henninger from Phoenix, Arizona, does not detract, in my opinion, from Gates' credibility with respect to this conversation because Gates, as well as one other driver, testified that it was sometimes necessary to falsify or place inaccurate information on their log sheets in order to meet dispatch requirements. Counsel for the General Counsel requested that the drivers daily log for January 29, 1981 (G.C. Exh. 11), be utilized to corroborate driver Gates contention that he spoke with Manager Henninger on that date inasmuch as counsel for the General Counsel contends that Gates made a notation on his log that Henninger had asked him about Calvin Cooper and the Union. The Respondent's counsel contends in brief that the notation regarding the conversation of Henninger about the Union appears to have been done by a different person than the one preparing the rest of the daily drivers log. Driver Gates testified that he placed all written material on General Counsel Exhibit 11 that appears thereon. As a nonhandwriting expert, I am unable to determine if all of the material on General Counsel Exhibit 11 was placed there by Gates, as testified to by him or not. There are certain similarities between the letters "s" in the material that was written later in time on the drivers daily log in issue. However, I note there are dissimilarities between the "a's," for example. Neither the General Counsel nor the Respondent Carrier sought to avail the court with a handwriting expert. I therefore decline to find that General Counsel Exhibit 11 either corroborates or detracts from the testimony of driver Gates.

Having concluded that Henninger inquired of Gates about the Union during the 1979 union campaign that culminated in a December 7, 1979 Board-conducted election, I find it is very probable that 2 months after the election year had passed that Henninger would again inquire with respect to the union activities of the drivers. I therefore credit the testimony of Gates that Manager Henninger asked him about the union activities of his fellow drivers, and that as such the Respondent violated Section 8(a)(1) of the Act as alleged in the complaint.

Driver Hickman S. Ridley Jr. testified that he called Carrier dispatch on March 13, 1981, and spoke with Manager Henninger. Henninger inquired of Ridley if the truck he was driving had run a car off the road. Ridley told Henninger that he had not caused any car to leave the road while he was driving the truck. Henninger wanted to know if his codriver, Gates, had run anyone off the road. Ridley informed Henninger that he did not know, that he (Henninger) would have to ask Gates; and Ridley then inquired if Henninger knew whether Carrier was still going to get new trucks. Henninger told Ridley that the new trucks were still on order. Ridley testified:

> Well, he asked if dispatch was doing better, and I said, Yeah, I said, they are real nice now, they talk real nice to us; but, I told him, I said, the transport associate driver had approached us, plus other drivers, wanting to go Union; and he said, if you try to go Union, he said, Carrier will fire me, they'll fire you, and they'll move this place out of Knoxville.

Ridley testified he made no response to Manager Henninger except to state to him that the drivers were not trying to hassle them or anything; that they just wanted to be left alone.

Manager Henninger recalled having a conversation with driver Ridley on March 13, 1981, wherein he asked Ridley if he (Ridley) had caused any car to run off the road. Henninger testified he had the conversation with Ridley pursuant to a telephone call he had received from a woman in Knoxville, Tennessee, that her automobile had been run off the John Sevier Highway by one of Carier's vehicles of which she was able to provide Henninger with the trailer number and time of the incident and with that information Henninger stated he had determined that the vehicle in question at that time had been driven by Ridley and Gates. Henninger testified he did not ask Ridley about anything else to his knowledge in the conversation.

I credit the testimony of Ridley with respect to the March 13 conversation with Manager Henninger because Ridley's testimony with respect to this incident was clear and convincing, whereas Henninger's testimony was not so much a denial of any such conversation as it was a lack of memory with respect to anything being discussed other than the incident of the automobile being run off the road.

I therefore conclude and find that the Respondent, through its manager, Henninger, threatened its employ-

ees with discharge as alleged in the complaint if they joined or engaged in activities on behalf of the Union.

F. *The 8(a)(1) Allegations Attributed to Manager of Industrial Relations Weissenberger*

Paragraph 11(b) of the complaint, as amended at the hearing herein, alleges that about February 22, 1981, the Respondent, through its supervisor and agent Joseph Weissenberger solicited grievances from its employees and promised to adjust the grievances with knowledge that the employees had engaged in union activities.

It is undisputed that there was a meeting on February 22, 1981, at which Pacemaker Manager of Industrial Relations Weissenberger spoke to drivers Gates, Ridley, David Donaldson, and Donnie Bales. Some of the items discussed at the February 22 meeting were dispatching and equipment, as well as Carrier's commitment to running legal and having accurate and neat logs. It was also announced at the meeting that a mileage increase, a revised vacation schedule, additional dental insurance for drivers and dependents, and a credit union had been established for the drivers' benefit, as well as the addition of a utility driver position. Complaints were discussed such as the complaint from the drivers that dispatchers had less than a desirable attitude toward the drivers. Working conditions were discussed such as loading, unloading, routes to be used, designation of loads, hazardous materials and the like, as well as the equipment to be utilized by the drivers.

Manager of Industrial Relations Weissenberger testified that he received complaints from various drivers throughout the year. Some of the complaints he received were transmitted to him by telephone; others came to him by way of drivers' meetings that he conducted—usually on an annual basis but sometimes more or less often than annually. The drivers' meetings were held for the purpose of making management announcements, changes in any wage or fringe benefits, and safety concerns; then the meetings were opened up for a general discussion of problems that the drivers had. Weissenberger's general practice was to follow up each meeting with written comments on the matters raised and/or discussed by the drivers at the meetings. Weissenberger testified the meeting immediately preceding the February 22, 1981 meeting was held he thought near the end of the 1979.

Driver Ridley testified that it was very common for complaints to be discussed at driver meetings such as, and of the nature, that were discussed at the February 22, 1981 meeting. Driver Donaldson who commenced work for Pacemaker as a Carrier driver in February 1980 testified he had never attended a meeting such as the February 22, 1981 meeting. Driver Gates testified there had been a like meeting in 1979.

The question then becomes whether the February 22, 1981 meeting represented a departure from the prior conduct of Pacemaker, whether Pacemaker had any knowledge of any union activity on the part of the drivers assigned to Carrier and whether Pacemaker solicited complaints from the drivers assigned to Carrier with any promises that the complaints would be resolved.

I do not credit Weissenberger's testimony that he had no knowledge of any union activity at the Knoxville, Tennessee facility at the time he conducted the February 22, 1981 meeting with the drivers assigned to Carrier. In light of the findings set forth above, the Respondent (Carrier and Pacemaker jointly), knew of the union activity of its employees as early as January 29, 1981. I am persuaded however, that the record evidence fails to establish that the Respondent deviated from its prior practice of conducting employee meetings of this nature. As driver Ridley readily admitted, it was very common for meetings of this nature to be held where matters such as those discussed at the February meeting were discussed with the drivers. This testimony supports Weissenberger's testimony that such meetings had been held from time to time since the beginning of Pacemaker's assigning drivers to Carrier. General Counsel Exhibit 9 clearly indicates that the practice of meeting with drivers to announce wage changes and/or seek driver comments or concerns was not a new one. Further, the pay increase announced at the February 22, 1981 meeting had been in the active planning stages for an extended period of time. (Pacemaker Exh. 4.) I therefore conclude and find that the Respondent acting through its supervisor and agent Weissenberger, did not unlawfully solicit grievances from its employees and promise to adjust them as alleged in the complaints. I shall therefore recommend dismissal of paragraph 11(b) of the complaint in its entirety. In dismissing that portion of the complaint, it is my opinion that counsel for the General Counsel failed to establish that the only time the Respondent responded to driver complaints and/or concerns was when there was union activity on the scene. The overall record evidence indicates contrary to the General Counsel's contentions.

G. *The Discharge of the Drivers Domiciled at Knoxville, Tennessee*

Paragraphs 15 and 16 of the complaint alleges that about March 30, 1981, Respondent discharged and thereafter failed and refused to reinstate its drivers Jonah C. Gates, Donnie Bales, David Donaldson, and Hickman S. Ridley Jr. because of their membership in and activities on behalf of the Union and because they engaged in protected concerted activity with other employees for the purposes of collective bargaining and other mutual aid and protection.

Each of the drivers named in the complaint testified to signing a card for the Union on February 22, 1981, a few hours after their meeting with Manager of Industrial Relations Weissenberger. The cards were turned into the Union by David Donaldson. Donaldson credibly testified that union official Barnes gave him approximately 50 cards to obtain signatures on. Donaldson got the four drivers in Knoxville to sign the union authorization cards and gave some cards to James Tedrow one of the Nashville, Tennessee drivers.

Each of the drivers named in the complaint testified, and I credit their testimony, that they called dispatcher Hagaman on March 30, 1981, to inquire about further dispatches and each was told by Hagaman, either in the first call or in a return call, that the Respondent did not have any work for them and no longer needed their

services and that they were moving the trucks out of Knoxville, Tennessee. Hagaman informed each of the drivers that if they had any questions they should call Manager of Industrial Relations Weissenberger. Some of the drivers called Weissenberger and were informed by him that the Respondent did not have anything available in the Knoxville, Tennessee area for them. Weissenberger told those he spoke with that he had known about their layoff since Friday, March 27, 1981, but had not told them because he did not wish to ruin their weekend. Weissenberger told the drivers that called him that he knew of the layoffs on Friday, March 27, 1981, because letters were mailed at that time advising the drivers they had been permanently laid off (G.C. Exh. 13).

Manager of Industrial Relations Weissenberger testified that conversations had been going on between himself and Manager Henninger about a possible change of domicile for the vehicles in question from Knoxville, Tennessee, to some other location for approximately a year before the actual change took place. Weissenberger testified he had no knowledge of any union activity at the Knoxville, Tennessee facility at the time of the domicile change.

Manager Henninger testified with respect to the move of the two units from Knoxville, Tennessee, to Cincinnati, Ohio, that the move came about primarily because of two factors that were occurring at the time of the move. One of the factors was that freight expense was higher in the Cincinnati, Ohio area and as such offered a greater savings for Carrier to provide freight at less than the current prevailing rate in the Cincinnati, Ohio area. Henninger testified that current freight expenses in the Knoxville, Tennessee area were in a deteriorating situation at the time. Henninger testified that the current freight rate as considered by Carrier was what it would cost Carrier to have the freight moved if it were not for Carrier Trucking Service. Henninger testified he learned of current freight rates because the rates were filed with the Interstate Commerce Commission and that even after deregulation a motor carrier had 30 days' notice with respect to any reduction or increase in freight rates.

With the Motor Carrier Act of 1980, which resulted in the deregulation of the trucking industry, Henninger testified it was easier to enter the trucking business so much so that practically anyone who wanted to get into the business could do so and that as a result competition was much greater with a free market system and that freight leaving the Knoxville, Tennessee area had encountered significantly reduced rates by other carriers and that it appeared, after an analysis by Carrier, that it would be more profitable for them to operate the two units in question from Cincinnati, Ohio, rather than Knoxville, Tennessee.

Henninger testified that Knoxville would have been "a marginal place" to continue to operate a domicile. Henninger testified that several factors entered into making Knoxville a marginal place to maintain a domicile. In addition to freight rates being reduced by other freight haulers there was a decrease in the volumn of outbound and inbound freight shipments from the Knoxville, Tennessee area. Henninger testified that when Carrier sold Dempsey Dumpster Corporation, which sale completely eliminated Dempsey Dumpster as a user of Carrier freight moving services, it brought about a reduction in the amount of inbound and outbound freight into Knoxville, Tennessee, where Dempsey Dumpster was based. Henninger testified that the relative tonnage in Cincinnati, Ohio, was much greater than the relative tonnage in Knoxville, Tennessee. Henninger testified that dead head miles (driving without freight) were greater in the Knoxville, Tennessee area. Henninger testified he had no knowledge of any union activity in the Knoxville, Tennessee area at the time of the elimination of the Knoxville domicile.

Director for Logistics for Carrier Sanford Abrahams testified that Carrier Trucking Service existed solely as a means to save money for Carrier, its parent corporation and its subsidiaries. Abrahams testified that the purpose of Carrier Trucking Service was to take the freight expenses of any particular portion of the corporation and determine if Carrier could move the freight at a savings to that company. Abrahams stated in their effort to save the greatest amount of money for the various corporations of Carrier that it had to maintain maximum flexibility and that as a result it did not buy trucks or employ drivers but rather leased its trucks, leased its drivers, and leased its equipment along with the maintenance for its equipment. Abrahams testified that the addition or deletion of domicile points for trucks was necessary as opportunities presented themselves for greater savings in one area and lesser savings in another. The Motor Carrier Deregulation Act of 1980 had a tremendous impact on the transportation service of Carrier, according to Abrahams, in that it allowed freedom of entry into the business creating more competition and as a result pricing fluctuated dramatically with the entry of the new businesses into the transportation service.

Abrahams testified he was very familiar with the decision process that lead to the movement of the two units from a Knoxville, Tennessee domicile to a Cincinnati, Ohio domicile. Abrahams testified that the decision was purely an econimical one based on facts relating to the amount of inbound and outbound freight in the Knoxville, Tennessee area. The movement of freight in and out of Knoxville was affected, according to Abrahams, by the sale by Carrier of the Dempsey Dumpster Corporation.

Abrahams testified that after the advent of the Motor Carrier Deregulation Act of 1980, Carrier could provide transportation services to certain of United Technologies wholly owned subsidiaries such as the Inmont Corporation. United Technologies owns Carrier and United Technologies also owns the Inmont Corporation. Abrahams testified that Carrier first looked for savings opportunities with respect to the Inmont Corporation in Belvedere, New Jersey, and then secondly looked for such potentials in the Cincinnati, Ohio area. Abrahams testified Cincinnati was examined because products of Carrier such as air-conditioners could be shipped from the Cincinnati area to the Houston area and in turn a back haul of chemicals from the Houston, Texas area could be made to the Inmont Corporation in Cincinnati, Ohio. Large shipments of freight were available into the Hous-

ton area because Houston was progressing well economically and there was a demand for air-conditioners in the Houston, Texas area. Also, a return freight of chemicals from Shell Chemical in Houston could be utilized by Inmont Corporation in the manufacture of printing ink and automobile paint according to Abrahams. Abrahams testified that since there was a potential for large savings for Carrier related corporations, particularly Inmont, in and around the Cincinnati, Ohio area it was decided to take the trucks out of Knoxville, Tennessee, and move then to Cincinnati. Abrahams testified that yet another factor that went into the decision to move the trucks from Knoxville to Cincinnati was the fact that the trucks domiciled in Knoxville had to be maintained by Preferred Leasing of Morristown, Tennessee, which according to Abrahams was 46 miles from Knoxville.

Abrahams testified that he had no knowledge of any union activity at the Knoxville, Tennessee facility among the drivers during the end of 1980 or the early part of 1981. Abrahams testified that Carrier still provided transportation service to certain of its corporations located in eastern Tennessee, namely, Allied Products and Athens Products, which are located in Knoxville and Athens, Tennessee, respectively. Abrahams further stated there was no meaningful inhaul of freight into Knoxville, Tennessee, after the loss of the Dempsey Dumpster account.

Carrier distribution analyst David Phillips testified his main function was to reduce transportation expenses for Carrier and its operational divisions and subsidiaries. Phillips testified he functioned as an inhouse transportation consultant for Carrier and that in mid-1980 he started studying a process aimed at a reduction of Inmont Corporation's freight expenses. He testified that from the 40 or more Inmont Corporation locations in the United States he determined there were three potential transportation cost savings areas. The three areas were Belvedere, New Jersey; Cincinnati, Ohio; and Detroit, Michigan. Phillips testified that Carrier first did a detailed analysis at the Belvedere, New Jersey location and then commenced doing a detailed analysis at the Cincinnati, Ohio location. Phillips testified that there were substantial outbound and inbound freight movements from the Cincinnati, Ohio area which his analysis showed was at a cost such that Carrier could perform the same services at substantial reductions in freight costs. Phillips testified he had no knowledge of any union activities in the Knoxville, Tennessee area in 1981. Phillips acknowledged that he did not do a cost analysis on the Knoxville terminal at the time he did his analysis on the potential for a Cincinnati, Ohio domicile. Phillips stated that in making an analysis of a location he did not normally consider weekend nonfreight moving deadhead miles as a factor.

Driver Donaldson and Ridley were called as rebuttal witnesses by counsel for the General Counsel and testified with respect to freight movement and deadhead miles involved at the Knoxville, Tennessee domicile. Donaldson in his rebuttal testimony stated that he had never made any deliveries from the Dempsey Dumpster Corporation to anywhere in the United States. Further, Donaldson testified that during the last month of his employment he never traveled deadhead from Knoxville, Tennessee, to Carrier's maintenance location in Morristown, Tennessee, some 46 miles east of knoxville. Donaldson testified he normally acquired his load from Athens Products in Athens, Tennessee, and left out on a Monday morning for Syracuse, New York. Donaldson testified that in leaving knoxville, Tennessee, with freight enroute to Syracuse, New York, he went through Morristown, Tennessee, where maintenance was performed and he did not have to double back to knoxville but rather proceeded north on Interstate Highway 81 which was east of Morristown and continued into Syracuse, New York. Donaldson testified that on his return from Syracuse, New York, he normally went into Morristown, Tennessee, and deadheaded from there either into Athens or Knoxville, Tennessee, for a load. Donaldson testified this particular trip was a frequent run for him. Donaldson estimated that it was approximately 100 miles from Moristown to Athens, Tennessee.

Driver Ridley testified he averaged traveling deadhead from Knoxville, Tennessee, to the maintenance facility in Morristown, Tennessee, approximately once a month. Ridley testified that on a Friday afternoon the drivers would be dispatched for the following Monday morning and on a normal dispatch there would be a load for them at the Knoxville terminal or they would pick up a loaded trailer and proceed to the Morristown, Tennessee maintenance facility and be ready to depart from the maintenance facility and on a Sunday evening. Ridley testified that on some occasions the drivers would have to run empty from Knoxville to Athens Products in Athens, Tennessee, some 60 miles from Knoxville, to obtain their load. According to Ridley, he might on occasion have had to proceed from Knoxville to Kentucky to pick up a load. He estimated it was 100 miles from Knoxville to the pickup point in Kentucky where he obtained his load.

Pacemaker contends it acted with no prior knowledge of any union activity in notifying the drivers in their letter of March 27, 1981, that they were being permanently laid off. Pacemaker contends no dual motive was involved from its standpoint that there was no balancing between a good cause and a bad cause with respect to the layoffs that it was simply notified by Carrier that they no longer had any business at Knoxville, Tennessee. Pacemaker contends the evidence demonstrates that it was confronted with an accomplished fact with respect to the decision and that it was powerless to affect the situation one way or another. Pacemaker contends that if any unfair labor practice is found with respect to the drivers' layoff that it must be totally derivative from a finding of a joint employer status.

Carrier contends inasmuch as it only handles 10 percent of the transportation needs of its overall corporate family, and considering that its mission is saving freight expenses rather than earning profits it is necessary that it have a very flexible freight system whereby it can identify and take advantage of saving opportunities and discard those situations which are no longer viable as potential savings areas. Carrier contends the record demonstrates that the process that eventually culminated in the move of the two trucks from Knoxville, Tennessee, to Cincinnati, Ohio, had its roots in the passage of the

Motor Carrier Act of 1980. Carrier contends that the Motor Carrier Act of 1980 essentially deregulated the trucking industry and as such impacted on Carrier's operations in three ways. First it increased the number of competitors. Secondly it caused the price of competitive services to fall, reducing the number of runs that Carrier could operate in certain areas. Thirdly it allowed Carrier to haul freight for more customers through the intercorporate hauling provisions of the Motor Carrier Act of 1980. Carrier contends that due to the Motor Carrier Act of 1980, Cincinnati, Ohio, in early 1981 became a more ideal location to maintain an equipment domicile than did Knoxville, Tennesee. Carrier contends that because of a lack of inbound and outbound freight and because of an inefficiently located maintenance facility, Knoxville was no longer considered by Carrier to be an appropriate place to maintain an equipment domicile.

Carrier contends that counsel for the General Counsel failed to demonstrate there was any union activity among the Knoxville drivers. Carrier further contends that the individuals involved in the decision to transfer the domicile from Knoxville to Cincinnati, namely Manager Henninger, Director of Logistics Abrahams, and distribution analyst Phillips, each testified they had no knowledge of any union activity by the Knoxville drivers at the time they made and implemented their decision to move the domicile from Knoxville, Tennessee, to Cincinnati, Ohio. Carrier contends that economic considerations were the only factors weighed by it in its decision to move the two units domiciled in Knoxville, Tennessee, to Cincinnati, Ohio.

Counsel for the General Counsel contends that the drivers were told if they continued their union activities that the Knoxville, Tennessee domicile would be closed and they would lose their jobs. The General Counsel contends in view of the concurrent threats to discharge the drivers and move the facility from Knoxville, it had clearly established a prima facie violation of Section 8(a)(1) and (3) of the Act with respect to the termination of drivers Gates, Bales, Donaldson, and Ridley on March 30, 1981. Counsel for the General Counsel contends that the Respondent's economic defenses fail because the Respondent acknowledges it had had opportunities for savings in the Cincinnati, Ohio area since August 1980 but did not take advantage of such opportunities until 1981. Further, counsel for the General Counsel contends that even if the Respondent could justify a Cincinnati, Ohio domicile it could not justify shutting down its facility in Knoxville, Tennessee. In support of that contention, the General Counsel refers to distribution analyst Phippips testimony that no comparison was available to the Respondent between Knoxville and Cincinnati as no cost analysis of the Knoxville, Tennessee location was done at the time of the movement of the domicile out of Knoxville. The General Counsel points out that Manager Henninger did not testify that the Knoxville facility was losing money but rather testified it was a marginal place to continue a domicile. Further, the General Counsel contends that the actions of Henninger and others prior to the implementation of the decision to transfer the domicile from Knoxville to Cincinnati was not in keeping with its comments to driver Ridley some few weeks prior to the layoff that the future looked bright with respect to the Knoxville location and that new equipment was going to be introduced into the area. Counsel for the General Counsel contends that Carrier's assertion that it lost inbound and outbound freight as a result of the sale of Dempsey Dumpster by Carrier was not borne out by the record as a whole. The General Counsel contends the Respondent did not present any evidence concerning the amount of any losses and calls attention to driver Donaldson's testimony that he never hauled from the Dempsey Dumpster facility and Ridley's testimony that he had at most made very few (four) trips to or from the Dempsey Dumpster facility in the 2 years he worked for the Respondent. The General Counsel contends that the deadhead miles, even assuming there were any, between Knoxville and Morristown, Tennessee, for repairs constituted conditions that had existed for an extended period of time and as such could not justify the timing of the shutdown of the Knoxville facility when viewed in light of the other factors surrounding the transfer of the domicile base from Knoxville to Cincinnati. Finally, the General Counsel contends that Carrier dispatchers and managers are still based in Knoxville, Tennessee, and that it would not stand to reason that the Respondent would close its Knoxville domicile and retain its management at that location if it were for valid economic reasons.

I am persuaded that counsel for the General Counsel established a strong prima facie case that the drivers' union activities constituted a "motivating factor" in the Respondent's decision to lay them off. See *Wright Line*, 251 NLRB 1083 (1980). I have concluded that counsel for the General Counsel established a prima facie case in that it is clear from the very nature of the threats and interrogation engaged in by agents and supervisors of the Respondent that it was concerned with and hostile to any union activity on the part of its employees. It is clear that Manager Henninger inquired about the union activities of Pacemaker drivers assigned to it in either late January or early February 1981. Further, based on the credited testimony of Gates, dispatcher Hagaman was told that the drivers were going to have to go union if harassment of them did not stop at which time Hagaman informed Gates that the Respondent would shut down the Knoxville facility and the drivers would lose their jobs. Driver Ridley also informed dispatcher Hagaman in the latter part of February 1981 that if the harassment did not stop it would end up in a union vote and at that time he was told the facility would close, the drivers would be fired, and the trucks would be moved out. It is clear from the unlawful conduct highlighted above and as set forth more fully under the 8(a)(1) section of the decision, the Respondent knew of the union activity of its drivers and it was hostile to their union activities. Therefore, I conclude and find counsel for the General Counsel established a prima facie showing sufficient to support an inference that union activity was a motivating factor in the Employer's decision to relocate its domicile from Knoxville, Tennessee, to Cincinnati, Ohio.

Having found that counsel for the General Counsel established a prima facie showing sufficient to support an

inference that protected conduct was a motivating factor in the Respondent's decision, the burden then shifted to the Respondent to demonstrate that the same action would have taken place even in the absence of the protected conduct. I conclude and find that the Respondent failed to meet its burden of showing that the action of relocating its domicile for trucks from Knoxville, Tennessee, to Cincinnati, Ohio, would have taken place even in the absence of protected conduct. I have so concluded for a number of reasons which I shall discuss in detail. The Respondent as late as March 18, 1981 informed its drivers in writing that it thought the overall operation was a good one and that from time to time they would be required to follow certain instructions with respect to loading and unloading of trucks and the like, however, no mention was made of any cessation of operation in the Knoxville area some 12 days later. In the same March 18, 1981, written correspondence, the Respondent announced to its drivers a mileage increase, a revised vacation schedule, and the addition of certain other benefits. Such factors do not point toward the closing of a facility. The opportunity for the Respondent to utilize Cincinnati as opposed to Knoxville as a domicile existed since August 1980, however, the opportunity was not exercised until the advent of union activity by the drivers. Distribution analyst Phillips testified that his computations with respect to Cincinnati as a point for the movement of freight out of and into the area were not made with a domicile factor in mind. Phillips also stated that in making his detailed analysis of a location he did not consider weekend, nonfreight moving, deadhead miles. Phillips acknowledged that he did not conduct a cost analysis of the Knoxville, Tennesee location at the time of the decision to move the domicile to Cincinnati. It would appear that the Respondent did not make a clear comparison between the two locations based on amounts of inbound and outbound freight such as to justify the move as being one solely done for economic considerations. I consider this failure to make a comparison study to have significant weight when viewed in light of; the fact that Manager Henninger, the individual probably most familiar with the freight movements of Carrier, only stated with respect to the savings potential in Knoxville, Tennessee, for Carrier that Knoxville was a "marginal" location to continue as a domicile. The Respondent's contention that deadhead miles was a factor it took into consideration in moving the domicile from Knoxville to Cincinnati is somewhat diminished by the fact that the domicile in Knoxville had operated for an extended period of time with the maintenance area in Morristown, Tennessee, which is approximately some 40 plus miles from Knoxville. This continued operation under those circumstances raises a clear suspicion that the timing of the shutdown was for other than economic considerations. It is undenied on this record, and I credit driver Ridley's testimony that he was told by Manager Henninger that his job looked secure at Carrier's Knoxville, Tennessee domicile because Carrier was going to add more trips, obtain new trucks, and that overall business looked good and they expected a record year and that Ridley had nothing to worry about. Driver Ridley testified he had the conversation with Henninger because he (Ridley) was getting married and wanted to know about the future security of his employment in Knoxville, Tennessee. The record does not support the Respondent's contention that it lost a great deal of its Knoxville freight hauling business when it sold Dempsey Dumpster to an unrelated corporation. Drivers Donaldson and Ridley testified that the amount of freight moved by Dempsey Dumpster was very limited, in fact, Donaldson testified he never hauled any freight from that facility and Ridley testified that he may have hauled two loads into and two loads out of the Dempsey Dumpster facility. The Respondent produced no documentation that would have demonstrated the amount of freight moved for Dempsey Dumpster prior to its sale nor did it attempt to refute or contradict the testimony that Dempsey Dumpster being sold had no impact upon the amount of freight moved into and out of the Knoxville, Tennessee area.

I find unpersuasive and unbelievable the testimony of Henninger and Weissenberger that the close of the Knoxville domicile had been the subject of ongoing conversations between them for several months. I find this testimony unbelievable in light of the testimony that Henninger had informed driver Ridley that the Knoxville domicile was doing well and that new trucks were going to be obtained for the drivers' use at that location.

Based on the record evidence as a whole and for the reasons outlined above I find that the Respondent failed to meet its burden of showing that the action it took with respect to the Knoxville domicile would have taken place even in the absence of protected conduct.

I therefore conclude and find that the Respondent violated Section 8(a)(1) and (3) of the Act as alleged in paragraphs 15 and 16 of the complaint when, about March 30, 1981, it discharged and thereafter failed and refused to reinstate its drivers Jonah C. Gates, Donnie Bales, David Donaldson, and Hickman S. Ridley Jr.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the Respondent, described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

CONCLUSIONS OF LAW

1. The Respondent, Pacemaker Driver Service, Inc., and Carrier Corporation Carrier Trucking Service are employers engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent, Pacemaker Driver Service, Inc., and Carrier Corporation Carrier Trucking Service are the joint employers of the employee drivers domiciled by Carrier Corporation Carrier Trucking Service at Knoxville, Tennessee.

3. Teamsters Local Union No. 519 is a labor organization within the meaning of Section 2(5) of the Act.

4. Dispatcher David Hagaman, at all times material herein, was an agent of the Respondent and was a supervisor within the meaning of Section 2(11) of the Act.

5. By coercively interrogating its employees concerning their union sentiments and activities; by threatening its employees with discharge if they joined or engaged in activities on behalf of the Union; by threatening employees it would close its terminal in Knoxville, Tennessee, if they joined or engaged in activities on behalf of the Union, the Respondent violated Section 8(a)(1) of the Act.

6. By discharging employees Jonah C. Gates, Donnie Bales, David Donaldson, and Hickman S. Ridley Jr. on March 30, 1981, and thereafter failing and refusing to reinstate them because of their union and protected concerted activities, the Respondent had engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

7. The violations of the Act noted above constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

8. The Respondent has engaged in no other unfair labor practices not specifically noted above.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Inasmuch as the Respondent unlawfully discharged its employee drivers Jonah C. Gates, Donnie Bales, David Donaldson, and Hickman S. Ridley Jr. on March 30, 1981, I shall recommend that the Respondent be ordered to reestablish a domicile at Knoxville, Tennessee, and offer to the four named drivers full and immediate reinstatement to their former jobs or substantially equivalent positions without prejudice to their seniority or other rights and privileges and make them whole for any loss of earnings they may have suffered as a result of their discharge. Backpay for the foregoing individuals and interest thereon shall be computed in the manner described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). Further, it is recommended that the Respondent expunge from its files any reference to its discharge of Jonah C. Gates, Donnie Bales, David Donaldson, Hickman S. Ridley Jr. and notify each in writing that this has been done and that evidence of their unlawful discharge will not be used as a basis for further personnel actions against them. See *Sterling Sugars*, 261 NLRB 472 (1982). I have recommended that the Respondent reestablish a domicile location in Knoxville, Tennessee, because the record evidence herein clearly indicates the move out of Knoxville was unlawfully motivated and there was insufficient evidence to establish that the Knoxville, Tennessee location was economically unfeasible. Further, it is noted that the Respondent does not maintain terminals in the traditional sense but merely domiciles trucks in a particular area and as such would incur limited if any expense in reestablishing a Knoxville, Tennessee domicile. Finally, it is recommended that the Respondent post the attached notice.

On the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Pacemaker Driver Service, Inc., Carrier Corporation Carrier Trucking Service, Knoxville, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees concerning their union sentiments and activities.

(b) Threatening its employees with discharge if they join or engage in activities on behalf of Teamsters Local Union No. 519 or any other labor organization.

(c) Threatening its employes that it would close its Knoxville, Tennessee facility if they join or engage in activities on behalf of Teamsters Local Union No. 519.

(d) Discharging and thereafter failing and refusing to reinstate its employees because they engaged in union or protected concerted activities.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act.

(a) Reestablish its Knoxville, Tennessee domicile and offer immediate and full reinstatement to its employees Jonah C. Gates, Donnie Bales, David Donaldson, and Hickman S. Ridley Jr. to their former positions of employment or, if those positions are no longer available, to substantially equivalent positions, without loss of seniority or other employee benefits and to make them whole for any losses they may have sustained by reason of their unlawful discharge with interest thereon as set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel reports and records, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.

(c) Expunge from its files any references to the March 1981 discharge of employees Jonah C. Gates, Donnie Bales, David Donaldson, and Hickman S. Ridley Jr. and notify them in writing that this has been done and that evidence of their unlawful discharges will not be used as the basis for future personnel actions against them.

(d) Post at its Knoxville, Tennessee place of business copies of the attached notice marked "Appendix."[5]

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Copies of said notice on forms provided by the Regional Director for Region 10 shall, after being signed by the Respondent's authorized representative, be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that those allegations in the complaint as to which no violations have been found are hereby dismissed.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all parties had the opportunity to present their evidence it has been decided that we violated the law in certain ways. We have been ordered to post this notice. We intend to carry out the order of the Board and abide by the following.

WE WILL NOT coercively interrogate our employees concerning their union activities or the union activities and sentiments of their fellow employees.

WE WILL NOT threaten our employees with discharge if they join or engage in activities on behalf of Teamsters Local Union No. 519 or any other labor organization.

WE WILL NOT threaten our employees to close our Knoxville, Tennessee facility if they join or engage in activities on behalf of Teamsters Local Union No. 519 or any other labor organization.

WE WILL NOT discharge our employees because they join or engage in activities on behalf of Teamsters Local Union No. 519 or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in other protected concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

WE WILL immediately reestablish a domicile in Knoxville, Tennessee.

WE WILL offer to Jonah C. Gates, Donnie Bales, David Donaldson, and Hickman S. Ridley Jr. immediate and full reinstatement to their former jobs or, if their former jobs no longer exist, to substantially equivalent positions of employment without prejudice to their seniority or other rights and WE WILL make them whole for any loss of pay they may have suffered by reason of our discrimination against them with interest.

WE WILL expunge from our files any references to the March 30, 1981 unlawful discharges of employees Jonah C. Gates, Donnie Bales, David Donaldson, and Hickman S. Ridley Jr., and WE WILL notify them that this has been done and that evidence of their unlawful layoff will not be used as a basis for future personnel actions against them.

PACEMAKER DRIVER SERVICE, INC., CARRIER CORPORATION CARRIER TRUCKING SERVICE